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No. 91-164

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA,
Petitioner

v.

THOMPSON/CENTER ARMS COMPANY,
A Division of the
K.W. THOMPSON TOOL COMPANY, INC.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF OF AMICI CURIAE SENATORS LARRY E. CRAIG, STEVE SYMMS, AND ROBERT C. SMITH IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI CURIAE

The Amici Curiae are members of the United States Congress who support the position of the respondent in this case because they have a special interest in protecting the rights of law-abiding persons who choose to own firearms. Each of the amici have sponsored and/or supported

legislation in this area, and have expressed their interpretations of such legislation to appropriate members of BATF. This brief is desirable to alert this Court to the special concerns of members of Congress which will not be adequately set forth in the brief of the respondent.

Senators Symms, Craig, and Smith (the latter two were then representatives) were strong supporters of the Firearms Owners' Protection Act. Pub. L. 99-308, 100 Stat. 449 (May 19, 1986). Senator Craig explained or participated in formulations of terms of relevance here which would be enacted as amendments to the National Firearms Act.

By letter dated September 13, 1985, Senator (then representative) Smith (along with Senator Warren Rudman) wrote to the Deputy Assistant Secretary (Operations), Department of the Treasury, who was then reviewing the opinion of the BATF Director concerning the Contender pistol and carbine kit. The senators stated that the items are not a short barrel rifle. This letter was also signed by then Senator Gordon Humphrey.

By letter dated June 17, 1986 to the BATF Director, Senator (then representative) Craig addressed a related issue, contending that single shot pistols and rifles which use the same receivers are not NFA firearms. This letter was also signed by Representatives Tommy Robinson, Don Young, John Dingell, Harold Volkmer, and Henson Moore.

SUMMARY OF ARGUMENT

The Contender pistol and carbine kit are not a rifle having a barrel less than 16 inches in length as those terms are used in 26 U.S.C. § 5845. These items are intended to be used as either a pistol or as a rifle with a 21″ barrel. A rifle is a weapon which has been "made" and is "intended" to be fired from the shoulder.

By contrast, three other types of "firearms" in § 5845 are defined in terms of combinations of parts; two of those definitions in addition require that the parts be designed and/or intended to be assembled as firearms as defined. "Rifle" is not defined in terms of a combination of parts, and Treasury concedes that a complete Contender pistol and a complete carbine, each with its own receiver, is not a short barrel rifle.

Even though short barrel rifles are restricted under the National Firearms Act, they were placed there for reasons which had little to do with criminal misuse. Current statistics show little criminal preference for such weapons. This counsels against an overly broad construction of the definition of a short barrel rifle.

The National Firearms Act regulates major weapons which should be known to be subject to control, and thus dispenses with scienter. By contrast, possession of the pistol and carbine kit, intended to be made only as a rifle with a 21″ barrel, is an innocent act. Since most circuits do not require a showing of knowledge of the legal character of a firearm, tens of thousands of persons who now possess pistols and carbine kits would become felons overnight if this Court interprets the statute in an overly broad manner.

Finally, the Second Amendment protects the right of the people to keep and bear arms. By construing the statute not to encompass the firearms at issue, the Court may avoid any constitutional issue of whether the stringent taxation and registration requirements of the National Firearms Act infringe on the right to keep arms.

ARGUMENT

I. THE CONTENDER PISTOL AND CARBINE KIT ARE NOT A SHORT BARREL RIFLE UNDER THE STATUTE

The Contender pistol and carbine kit are not "a rifle *having* a barrel or barrels of less than 16 inches in length" as those terms are used in 26 U.S.C. § 5845 (a)(3). As enacted in 1954 and amended in 1958 and 1968, § 5845(c) provides:

> the term 'rifle' means a weapon designed or redesigned, *made or remade*, and *intended* to be fired from the shoulder and designed or designed and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge. (Emphasis added.)

A Contender pistol and carbine kit do not fit the above definition. They are not a "weapon" which is "made" and "intended to be fired from the shoulder" with a barrel of less than 16", nor can they be readily "restored" to something they have never been. As § 5845(i) further clarifies: "The term 'make' and the various derivatives of such word, shall include manufacturing . . . , *putting together*, altering, any combinations of these, or otherwise producing a firearm." The definition of "make" as "putting together" would apply to a rifle, and not to a firearm defined as a combination of parts, which thereby need not be put together.

26 U.S.C. § 5845(b), enacted as a provision of the Gun Control Act of 1968, Pub. L. 90-618, 82 Stat. 1213 (Oct. 22, 1968), provides in part: "The term 'machinegun' means . . . any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person." This is an absolute liability definition in that it does not require

any intent to assemble the parts into a machinegun. No such definitional language exists for the term "rifle."

26 U.S.C. § 5845(f), also enacted in 1968, defines a "destructive device" in part as follows:

> . . . (2) any type of weapon by whatever name known which will, or which may be *readily converted* to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun . . .; and (3) *any combination of parts either designed or intended* for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and *from which a destructive device may be readily assembled.* The term "destructive device" shall not include any . . . rifle which the owner intends to use solely for sporting purposes. (Emphasis added.)

Under this definition, a combination of parts from which one could readily assemble a nonsporting rifle with a bore of more than one-half inch, is not a destructive device unless designed or intended to be so used. Once again, no such definition exists for the term "rifle."

In the Firearms Owners' Protection Act of 1986, Congress enacted 26 U.S.C. § 5845(a)(7), incorporating 18 U.S.C. § 921(a)(24), which provides:

> The terms 'firearm silencer' and 'firearm muffler' mean any device for silencing, muffling, or diminishing the report of a portable firearm, *including any combination of parts*, designed or redesigned, and *intended for use in assembling or fabricating* a firearm silencer or firearm muffller, and any part intended only for use in such assembly or fabrication.[1]

[1] Emphasis added. Moreover, in connection with a new provision in 18 U.S.C. § 921(a)(17)(B) concerning certain ammunition, the following definition was enacted: "'handgun' means any firearm including a pistol or revolver designed to be fired by the use of a single hand. *The term also includes any combination of parts from*

Under this definition, to be a silencer, a combination of parts must be both designed *and* intended for such use.

By such enactments,[2] Congress has clearly expressed its intent that a combination-of-parts definition does not apply to rifles, and that, even where it applies to certain NFA firearms, an intent requirement may also exist. The Contender pistol and carbine kit are explicitly intended to be assembled only as a pistol or as a rifle with a 21" barrel. Indeed, BATF concedes that possession of a complete pistol and a complete carbine (each with its own separate receiver) is not an NFA firearm, and thus that a combination-of-parts definition does not apply. Yet nothing in the statute sanctions BATF's position that a combination-of-parts definition applies if only one receiver is present for use in both the pistol and the carbine.

In contrast with other firearms, rifles were never defined in an expansive manner, and have been steadily removed from NFA controls.

The 1934 Act defined a "firearm" as including a "rifle *having* a barrel of less than eighteen inches in length . . . or any other *weapon*, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person. . . ." National Firearms Act, Pub. L. 474, 48 Stat. 1236 (June 26, 1934). Thus, to be a "firearm," a rifle had to "hav[e]"—in the present tense—a barrel of less than 18 inches and had to be a "weapon," thereby excluding mere parts not usable

which a handgun can be assembled." Pub. L. 99-408, § 10, 100 Stat. 920 (Aug. 28, 1986) (emphasis added).

[2] In the Crime Control Act of 1990, Congress amended the Gun Control Act to provide that "it shall be unlawful for any person to *assemble from imported parts any semiautomatic rifle* or any shotgun" which has not been approved for importation. 18 U.S.C. § 922(r) (emphasis added). In other words, a "rifle" does not exist until it is "assemble[d]"—that is, put together so that a complete, functioning weapon results—from "parts" (in this case, "imported parts").

as a weapon and intended for assembly only as a pistol or as a rifle with a barrel over 18 inches.

A 1936 amendment added that a firearm "does not include any rifle which is within the foregoing provisions solely by reason of the length of its barrel if the caliber of such rifle is .22 or smaller and if its barrel is sixteen inches or more in length. . . ." Pub. L. 490, 49 Stat. 1192 (Apr. 10, 1936). This exempted ".22 and less caliber hunting rifles . . . which are in fact less susceptible of being concealed on the person than other types of rifles" not encompassed within the NFA. H.R. Rept. 2000, 74th Cong., 2d Sess., 1 (1936).

In 1938, the Act was again amended to provide a reduced tax "on any gun with two attached barrels, twelve inches or more in length, from which only a single discharge can be made from either barrel without manual reloading. . . ." Pub. L. 651, 52 Stat. 756 (1938). This illustrates that NFA firearms were not implicitly defined as mere combinations of parts, since here the barrels had to be "attached." This provision survives in reworded form as "weapons with combination shotgun and rifle barrels 12 inches or more, less than 18 inches in length," 26 U.S.C. § 5845(e).[3]

The current definition of "make" in § 5845(i) originated in 1952. Pub. L. 353, 66 Stat. 87 (1952) ("the making in the United States of any firearm (whether by manufacture, putting together, alteration, any combination thereof, or otherwise). . . ."). The committee report explained:

> Section 1 of the bill brings such sawed-off shotguns under the act by taxing the action of sawing off the barrel or otherwise making such firearm, by requir-

[3] The rewording was enacted in 1954 to clarify that a combination rifle and shotgun, which was considered sporting, but not a double barrel shotgun, would qualify for the reduced tax. H.R. Rept. 1337, 83d Cong., 2d Sess., *reprinted in* 1954 U.S. Code Cong. & Admin. News 4019, 4539.

> ing the filing of a declaration of intention and payment of the tax prior to such making, and by imposing the penalties of the act upon those making such firearms without first paying the tax and filing the declaration of intention. H.R. Rept. No. 1714, 82d Cong., 2d Sess., at 2, *reprinted in* 1952 U.S. Code Cong. & Admin. News p. 1456.

In 1954, "rifle" was defined to include only "a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed and made to use the energy of the explosive in a fixed metallic cartridge. . . ." Pub. L. 83-591, 68A Stat. 3 (1954), codified at 26 U.S.C. § 5848 (1954). This excluded mere parts not "made" into a "weapon" which is "intended to be fired from the shoulder," as well as rifles which did not fire fixed metallic cartridges. This definition was passed "in pursuance of the clearly indicated congressional intent to cover under the National Firearms Act only such modern and lethal weapons . . . as could be readily and efficiently used by criminals and gangsters." H.R. Rept. No. 1337, 83d Cong., 2d Sess. 524, *reprinted in* 1954 U.S. Code Cong. & Admin. News 4019, 4542.

In 1958, the terms "designed and made" were replaced with "designed or redesigned and made or remade," apparently to include a rifle which was not originally designed and made to fire a fixed metallic cartridge, but was redesigned and remade to do so. Pub. L. 85-859, 72 Stat. 1275, 1427 (1958).

In 1960, Congress altered the definition of "firearm" to include "a rifle having a barrel or barrels of less than 16 inches in length, or any weapon made from a rifle or shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than 26 inches. . . ." Pub. L. 86-478, § 3, 74 Stat. 149 (1960). The Senate report explained that rifles with barrels between 16 and 18 inches "are primarily sporting guns," and that "a number of popular sporting rifles have a barrel length just slightly under 18 inches with the

result that they are classified as a 'firearm' subject to these special taxes and control provisions. It is not believed that these guns constitute a type of weapon, such as a sawed-off rifle or shotgun, which is likely to be used by the criminal element." S. Rept. No. 1303, 86th Cong., 2d Sess., at 3, *reprinted in* 1960 U.S. Code Cong. & Admin. News 2111, 2113. As the Court of Appeals noted: "The amendment is relevant as an example of Congress once again turning its attention to the type of rifles it wanted to regulate under the NFA and once again, declining to cover combinations of rifle parts." (Pet. App. 10a n.3.)

The 1968 Act, while adding the "readily restored" language, did not add combination-of-parts language to the "rifle" definition as it did with the "machinegun" and "destructive device" definitions. Moreover, it provided:

> The term 'firearm' shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon. 26 U.S.C. § 5845(a).

Pursuant to this provision, BATF has removed hundreds of short barrel rifles (including semiautomatic pistols with instantly attachable shoulder stocks) from the NFA. (C.A. App. 48-49; Ex. 2, App. to Mot. of Pl. for Sum. J., A47-A57.

Finally, as noted *supra*, the Firearms Owners' Protection Act of 1986 enacted combination-of-parts language in a definition of "silencer," but Congress again did not add such language to the definition of "rifle." In fact, Senator Hatch, floor manager of the Act, wrote a letter in 1985 to the BATF Director explictly stating that the Contender pistol and carbine kit are not a short barrel rifle. (Ex. 5, App. to Pl. Mot. for Sum. J., A134.) Senator Hatch's letter is worth quoting at length:

For years several of my constituents and other interested parties have manufactured kits which convert certain pistol receivers into a single-shot carbine. These manufacturing activities were undertaken in reliance on earlier written rulings of the Bureau of Alcohol, Tobacco and Firearms which established that interchangeable barrels did not subject these firearms to the requirements of the National Firearms Act. A few of these earlier rulings are attached.

These rulings from 1971, 1973, 1976, and 1983 make sense because the mere possibility that legal firearms, as both the pistol and the fully assembled carbine made from the same receiver would be, might be reassembled into an illegal firearm should not subject the legal pistol and the legal carbine to National Act regulation. The particular finely tooled firearms in question, namely Contender pistols are designed solely for hunting or target shooting. As you have recommended in the past, it is certainly appropriate for the manufacturer of these pistol-carbine conversion kits to notify the purchaser that attaching the carbine stock to a firearm with a barrel length of less than sixteen inches would violate the National Act.

It has come to my attention that the Bureau intends to revoke these rulings and make the mere possession of the conversion parts for the Contender pistol and carbine illegal, even though these parts are intended to be used only as a legal pistol or a legal carbine. This could penalize many sportsment who have relied on earlier BATF rulings when purchasing these convertible firearms. Moreover banning the conversion kits or convertible firearms would have, to my knowledge, little or no effect on crime because these firearms are rarely, if ever, used feloniously.

In light of these considerations, I would respectfully respect that you reconsider any intention to revoke the earlier rulings.[4]

[4] The rulings above are set forth in C.A. App. 31-38.

This demonstrates that the Senate floor manager of the latest comprehensive amendments to the Gun Control Act understood the NFA not to apply to the Contender pistol and carbine kit; that many carbine kits have been produced and are used by sportsmen; and that BATF was on notice of this congressional interpretation, yet sought no combination-of-parts language in the definition of "rifle" as it did for silencer. 132 CONG. REC. H1700 (Apr. 9, 1986). Indeed, BATF itself does not contend that a combination-of-parts definition exists here if two receivers are present.

In sum, the Contender pistol and carbine kit are not encompassed in the NFA. The overall statutory scheme and the legislative history demonstrate that these sporting arms are precisely the types of weapons Congress intended *not* to include in the NFA's stringent requirements.

II. THE ORIGINS OF NFA REGULATIONS AND LACK OF CRIMINAL MISUSE COUNSEL AGAINST AN OVERLY BROAD CONSTRUCTION OF THE DEFINITION OF A SHORT BARREL RIFLE IN THE NFA

Before 1934, short barrel rifles for sporting purposes were in wide use. The Winchester Model 92 (14″ barrel) was preferred by trappers,[5] and others enjoyed the Stevens pocket rifle.[6] There were buggy rifles and bicycle rifles, which were convenient to carry.[7] A great number,

[5] They cost only $18.00 in 1892. "In running a line of traps for smaller animals these men would not infrequently catch a wolf or a bear, and a Model 92 with a fourteen-inch barrel was effective in dealing with these animals." By 1932—two years before the National Firearms Act restricted the Trapper—Winchester presented its one millionth Trapper to Secretary of War Patrick Hurley. H. Williamson, WINCHESTER: THE GUN THAT WON THE WEST 159 (1952).

[6] J. Grant, BOY'S SINGLE SHOT RIFLES *passim* (New York 1967).

[7] *Id.*

of course, were boys' rifles, with shoulder stocks as well as short barrels.[8] Whether designed for adult convenience or children's usage, small rifles were associated with hunting and recreation.[9]

As originally proposed in 1934, the bill that became the National Firearms Act would have defined "firearm" to include a pistol, short barrel shotgun, "or any other firearm capable of being concealed on the person," or a machine gun.[10] Short barrel rifles were not expressly included.

Attorney General Homer S. Cummings stated that "this bill does not touch in any way the owner, or possessor, or dealer in the ordinary shotgun or rifle." The interests of "the sportsman who desires to go out and shoot ducks, or the marksman who desires to go out and practice" were completely protected.[11] The following discussion ensued:

> Mr. [Harold] KNUTSON. General, would there be any objection, . . . after the word "shotgun" to add the words "or rifle" having a barrel less than 18 inches? The reason I ask that is I happen to come from a section of the State where deer hunting is a very popular pasttime in the fall of the year and, of course, I would not like to pass any legislation to forbid or make it impossible for our people to keep arms that would permit them to hunt deer.[12]

The obvious purpose of adding short barrel rifles was to prevent longer barrel rifles from being interpreted as "any other firearm capable of being concealed on the person," and to set an objective standard for length. This

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[8] *Id.*

[9] *Id.*

[10] National Firearms Act: Hearings before the Committee on Ways and Means, U.S. House of Rep., 73rd Cong., 2nd Sess. at 1 (1934).

[11] *Id.* at 6.

made particular sense as long as pistols and revolvers were being expressly regulated. No one claimed that restricting short barrel rifles had law enforcement value. The Knutson amendment clarified that "a rifle of 18 inches or more would not be a firearm under this definition." [13]

A compromise was reached which excluded pistols and revolvers from the bill,[14] although Congress neglected to remove short barrel rifles from the bill as well. The anomalous result was that large and small rifled arms—long barrel rifles and pistols—were not regulated by the NFA, but medium sized rifled arms—short barrel rifles—were regulated.

H.R. Rept. 1780, 73rd Cong., 2d Sess., 1 (1934) explained: "Limiting the bill to the taxing of sawed-off guns and machine guns is sufficient at this time. It is not necessary to go so far as to include pistols and revolvers and sporting arms." S. Rept. 1444, 73rd Cong., 2d Sess., 1 (1934) repeated this statement. The capacity of a sporting arm to be sawed off or otherwise converted did not make it an NFA firearm.

In House debate, it was agreed that "sawed-off . . . rifles," and not "the ordinary sporting rifle," would be subject to the NFA. 78 CONG. REC. 11400 (June 13, 1934) (statements of Reps. Bertrand Snell and Robert Doughton). The bill was approved by those "interested in sport and sporting arms, from the standpoint of the use of those arms for ordinary purposes." *Id.* at 12555 (June 18, 1934) (exchange between Reps. George W. Blanchard and Samuel B. Hill).

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[12] *Id.* at 13.

[13] *Id.* at 95-96 (Statements of Congressman Samuel B. Hall and Assistant Attorney General Keenan).

[14] *See* To Regulate Commerce in Firearms: Hearings Before a Subcommittee of the Committee on Commerce, U.S. Sen., 73rd Cong., 2nd Sess. at 58 (1934).

The NFA was not comprehensively amended until passage of the Gun Control Act of 1968. The legislative history of the 1968 Act reveals little mention of short barrel rifles (though much on machineguns, sawed-off shotguns and destructive devices).[15] No link between short barrel rifles and crime was strongly suggested by anyone in Congress in that period.[16]

While most states ban or severely regulate machineguns and sawed off shotguns, in 1969, *United States* v. *Benner*, 417 F.2d 421, 224-25 n.10 (9th Cir. 1969) listed 44 states and the District of Columbia as jurisdictions where a sawed-off rifle could be legally possessed, and only six states where possession thereof could be a crime. About half of the state legislatures and the District of Columbia currently treat the short barrel rifle no differently than long barrel rifles.[17] Those with special restrictions may have adopted them just because the National Firearms Act did so.

Criminologists James Wright and Peter Rossi have found that many criminals are apt to saw off a shotgun,

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[15] When asked for statistics concerning the sources of "sawed-off shotguns and sawed-off rifles," IRS Commissioner Sheldon Cohen filed a report stating that "sawed-off shotguns can be made from standard shotguns with relative ease. . . ." Anti-Crime Program: Hearings Before Subcommittee No. 5, Commitee on the Judiciary, U.S. House of Rep., 90th Cong., 1st Sess., 559, 568 (1967).

[16] In Federal Firearms Act: Hearings Before the Subcommittee to Investigate Juvenile Delinquency, Judiciary Commitee, U.S. Senate, 90th Cong., 1st Sess., 968 (1967) John M. Schooley, special investigator for the Treasury Department, testified: "In my 20 years' experience enforcing provisions of this act, I have never had the privilege of registering a machinegun, sawed-off rifle or shotgun, possessed by a person known to operate outside the law. I have, however, registered many saddle guns, many short-barreled caliber .22 rifles and combination .22 and .410 arms and other such firearms for law-abiding citizens."

[17] *See* STATE LAWS AND PUBLISHED ORDINANCES: FIREARMS *passim* (BATF 1989).

but those few who use rifles are more apt to leave them unmodified. J. Wright and P. Rossi, ARMED AND CONSIDERED DANGEROUS 95 (1986).[18] Based on research interviews supported by the National Institute of Justice with predatory, violent felons, they found the following percentage of guns preferred by criminals:

1. What kinds of gun(s) have you *ever used* to commit crimes?

Handgun	90
Sawed-off shotgun	27
Regular shotgun	16
Sawed-off rifle	7
Regular rifle	10
Zipgun (homemade)	3
All other	4

* * * *

4. What kind of [weapon] have you used *most frequently* in committing crimes?

Handgun	85
Sawed-off shotgun	9
Regular shotgun	3
All other guns	3

The FBI Uniform Crime Reports 12 (1990) states: "Of those murders for which weapons were reported, 50 percent were by handguns, 6 percent by shotguns, and 4 percent by rifles."[19] Although the Reports do not distinguish rifles by barrel length, it is obvious that rifles of all kinds were used less than shotguns and far less than handguns.

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[18] Exhibit 2, Appendix to Motion of Plaintiff for Summary Judgment, A61.

[19] The same reference gives the following statistics for murder victims, type of weapons used, in 1990:

Handguns	9,923
Rifles	741
Shotguns	1,237

In sum, the sawed-off rifle appears used in crime less than any other firearm. Less accurate than a long barrel rifle and less concealable than a handgun, a short barrel rifle has no particular advantage. While short barrel rifles are restricted under the NFA, the legislative history and criminological data suggest that the NFA definitions should not be stretched to include the product at issue here.

III. POSSESSION OF THE PISTOL AND CARBINE KIT IS AN INNOCENT ACT, WHILE THE NFA REGULATES MAJOR WEAPONS KNOWN TO BE SUBJECT TO REGULATION AND THUS DISPENSES WITH SCIENTER

If this Court, as the government requests, recognizes a combination-of-parts definition for rifle where only one receiver is present, what intent standard will it impose? The three types of firearms with combination-of-parts language in their definitions also have three different intent standards. A combination of parts from which a machinegun can be assembled is sufficient, without further intent, to be a machinegun. 26 U.S.C. § 5845(c). To be a combination of parts constituting a destructive device, the parts must be designed *or* intended to be so assembled, *and* must be capable of being readily assembled. 26 U.S.C. § 5845(f). For a combination of parts to be a silencer, they must be both designed *and* intended to be assembled as such. 26 U.S.C. § 5845(a)(7), incorporating 18 U.S.C. § 921(a)(24).

If this Court were to embark on the perilous venture of what would be tantamount to legislating a combination-of-parts definition for "rifle" where a pistol with only one receiver is present, where Congress has chosen not to do so, no justification would exist to dispense with an intent standard. Since two types of NFA firearms with combination-of-parts language in their definitions also have intent standards, it would be incongruous to say that a firearm definition with no combination-of-parts language nonetheless should be so construed, but that no

intent is required. Indeed, it would be particularly incongruous since § 5845(c) defines a "rifle" as a "weapon" which has been designed, made, and "intended" to be fired from the shoulder.

Even if this Court recognized a combination-of-parts plus intent component in the definition of "rifle," as exists for destructive device and silencer, the Contender pistol and carbine kit still would not be a NFA firearm because they are *not* intended to be assembled as a short barrel rifle.

The Court of Appeals noted that Contender carbine kits made by other manufacturers have been sold since the late 1960s. (Pet. 2a) Some several tens of thousands of carbine kits have been marketed without any known objection by BATF. C.A. App. 58. BATF in fact advised one Contender kit maker that a shoulder stock and barrel may be freely sold, and that only "the *attaching* of a shoulder stock to a handgun with a barrel of 16 inches or less subjects that firearm" to the NFA. *Id.* at 35-36. Moreover, as noted *supra*, Senator Hatch advised BATF in 1985 that for years several of his constituents had manufactured carbine kits for the Contender, and urged BATF not to reverse its rulings made between 1971 and 1983 that such combinations of parts are not a short barrel rifle. Pl. Ex. 5, App. to Mot. for Sum. J., A134.

Should this Court decide that the Contender pistol and carbine kit constitute an NFA firearm, then many tens of thousands of law-abiding sportsmen will become felons the instant this Court's decision is announced. To be prosecuted, none of these citizens need have any knowledge that their sporting guns are actually NFA firearms.

In *United States* v. *Freed*, 401 U.S. 601, 607 (1971), this Court held that scienter need not be shown in an NFA prosecution. Under long-established case law, "the only knowledge required to be proved was knowledge that the instrument possessed was a firearm. See *Sipes* v.

United States, 321 F.2d 174, 179, and cases cited." 401 U.S. at 607. This Court found the NFA to be like the act in *United States* v. *Dotterweich*, 320 U.S. 277, 284 (1943), where "we approved the penalty though consciousness of wrong-doing be totally wanting." 401 U.S. at 609. This Court continued:

> This is a regulatory measure in the interest of public safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act. They are *highly dangerous offensive weapons*, no less dangerous than the narcotics involved in *United States* v. *Balint*, 258 U.S. 250, 254. . . . We say with Chief Justice Taft in that case: ". . . Its manifect purpose is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him." *Id.* (Emphasis added).

In his concurring opinion in *Freed*, Justice Brennan wrote:

> Two factors persuade me that proof of mens rea as to the unregistered status of the grenades is not required. First, as the Court notes, the case law under the provisions replaced by the current law dispensed with proof of intent in connection with this element. Sipes v. United States, supra. Second, the firearms covered by the Act are *major weapons* such as machine guns and sawed-off shotguns; *deceptive weapons* such as flashlight guns and fountain pen guns; and *major destructive devices* such as bombs, grenades, mines, rockets, and large caliber weapons including mortars, anti-tank guns, and bazookas. Without exception, the likelihood of government regulation of the distribution of such weapons is so great that anyone must be presumed to be aware of it. (emphasis added) *Id.* at 616.

By contrast, a single shot Contender pistol and carbine kit, possessed for decades by tens of thousands of sports-

men, are not "highly dangerous offensive weapons" or "major weapons" in the same class as grenades or machineguns. Thus, a sportsman could hardly be presumed to know that a Contender pistol and carbine kit—because they have only one rather than two receivers—are subject to the same regulations as machineguns, bombs, and heroin.

Most circuits maintain that, to be convicted of an NFA offense, one need not know that a gun is an NFA firearm. The government must prove only that a defendant knows an item is a firearm in the general sense, not that it is a "firearm" as particularly defined in the NFA. Indeed, in *United States* v. *Thomas*, 531 F.2d 419, 420 (9th Cir. 1976), *cert. denied* 425 U.S. 996 (1976), where the defendant thought the inoperable item was an antique pistol, the court upheld a jury instruction that "the defendant does not have to know that the firearm is a short barrel rifle." Similarly, *United States* v. *Gonzalez*, 719 F.2d 1516, 1522 (11th Cir. 1983), *cert. denied* 465 U.S. 1037 (1984) held:

> The government does not have to prove that the defendant knew that the weapon in his possession was a "firearm" within the meaning of the statute, or that he knew registration was required. It is a violation of federal law for Defendant Gonzalez to merely possess such a weapon not registered to him. There is no scienter required to be proven.

See also United States v. *Mittleider*, 835 F.2d 769, 774 (10th Cir. 1987), *cert. denied* 485 U.S. 980 (1988) ("the government is not required to prove actual knowledge"); *United States* v. *Shilling*, 826 F.2d 1365, 1368 (4th Cir. 1987), *cert. denied* 484 U.S. 1043 (1988) ("sufficient intent is established if the defendant is shown to have possessed an item 'which he knew to be a firearm within the general meaning of the term.'"), quoting *Morgan* v. *United States*, 564 F.2d 803, 805 (8th Cir. 1977). *Accord*, *United States* v. *Ranney*, 524 F.2d 830, 832 (7th

Cir. 1975), *cert. denied* 424 U.S. 922 (1976). *United States* v. *DeBartolo*, 482 F.2d 312, 316 (1st Cir. 1973) stated:

> The Government need not prove that a defendant knows he is dealing with a drug or a weapon possessing every last characteristic which subjects it to regulation. It is enough to prove that he knows that he is dealing with a dangerous device of such type as would alert one to the likelihood of regulation. If he has such knowledge, and if the particular item is in fact regulated, he acts at his peril. A shotgun in today's society plainly falls within this category.

Nonetheless, the Fifth and Sixth Circuits, and to some extent a recent Ninth Circuit case, have found that the government must prove that the defendant knew the gun was a firearm of the type defined in the NFA. Indeed, in the only *en banc* decision on this issue, *United States* v. *Anderson*, 885 F.2d 1248, 1251 (5th Cir. 1989) (en banc) held that a "conviction should require that the charged party knew it was a 'firearm' in the *Act* sense, not that he (or she) merely knew it was a firearm." *Anderson* added:

> It is one thing for the Court to liken hand grenades to narcotics, as it did in *Freed*; quite another to draw such a parallel where ordinary skeet guns or target rifles are concerned. For the National Firearms Act does not treat conventionally manufactured, normal revolvers, semi-automatic pistols, hunting rifles, or shotguns as anything other than perfectly innocent, legal items. It does not purport to create any presumptions about any such items, or to regulate them in any manner. Common sense tells us that millions of Americans possess these items with perfect innocence. . . .
>
> We think it far too severe for our community to bear—and plaintly not intended by Congress—to subject to ten years' imprisonment one who possesses what appears to be, and what he innocently and reasonably believes to be, a wholly ordinary and legal pistol . . . . *Id.* at 1254.

United States v. *Williams*, 872 F.2d 773, 777 (6th Cir. 1989) agreed that: "Millions of Americans possess different varieties of hand guns and rifles without any consciousness of wrongdoing, or any suspicion that these weapons are as potentially dangerous as narcotics." Thus, the court held that "the government was required to show that defendants knew that a 'firearm' as legislatively defined was being transferred." *Id.*

Finally, *United States* v. *Herbert*, 698 F.2d 981, 986 (9th Cir. 1983), *cert. denied* 464 U.S. 821 (1983), found that "legal firearms are quite prevalent in today's society," and thus the government must prove possession of "a dangerous device of such type as would alert one to the likelihood of regulation. . . ." *But see United States* v. *Thomas, supra.*

Even the most prudent man would be surprised to know that the possession of a single shot sporting pistol, and a kit to make a riflle with a 21″ barrel, is not an innocent act. Thus, if this Court finds that a Contender pistol and carbine kit are an NFA weapon, a defendant could be convicted of a felony in some circuits and not others. Keeping in mind that scienter need not be proven,[20] the acceptance of the government's position would subject tens of thousands of people to felony prosecutions and imprisonment up to 10 years and/or a fine up to $10,000.00 for engaging in what is commonly viewed as an innocent

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[20] As Thompson/Center demonstrates in its brief, it is fundamental that ambiguous taxing statutes are to be construed in favor of taxpayers, and that ambiguous criminal statutes must be construed in favor of the persons subject thereto. Since these principles apply even in the case of statutes that require a showing of willfulness to establish a violation, it is even more imperative that these principles apply to a statute such as the NFA which requires no willfulness and even more so to the firearms at issue here given their innocent appearance.

act. Accordingly, this Court should rule that the pistol and carbine kit are not an NFA firearm.

IV. THE STATUTE SHOULD BE CONSTRUED NARROWLY TO AVOID ANY SECOND AMENDMENT QUESTION

This Court should construe the statute narrowly so as to avoid any issue of whether the NFA's registration requirements and extraordinarily high rates of taxation implicate the Second Amendment to the United States Constitution. The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." "It is common ground that this Court, where possible, interprets Congressional enactments so as to avoid raising serious constitutional questions."[21] *Cheek* v. *United States*, 111 S.Ct. 604, 611 (1991).

In enacting the Gun Control Act of 1968 and the Firearms Owners' Protection Act of 1986, Congress enacted combination-of-parts definitions (with different intent standards) for machineguns, destructive devices, and silencers, but refrained from doing so in regard to rifles. Indeed, sensitivity to the Second Amendment protection accorded ordinary rifles, pistols, and shotguns is made clear in the preamble to the 1986 Act:

> CONGRESSIONAL FINDINGS—The Congress finds that—
>
> (1) the rights of citizens—

[21] In *United States* v. *Bass*, 404 U.S. 336, 349-351 (1971), this Court construed a provision of Title I of the Gun Control Act of 1968 in favor of a felon in possession of a firearm, in part to avoid the constitutional problem of whether Congress can prohibit mere possession of a firearm by a felon without an interstate commerce nexus. Similarly, a narrow statutory construction should be applied to avoid the potential constitutional problem of whether the NFA, which is Title II of the Gun Control Act, infringes on the Second Amendment rights of law-abiding citizens.

> (A) to keep and bear arms under the second amendment to the United States Constitution;
>
> (B) to security against illegal and unreasonable searches and seizures under the fourth amendment;
>
> (C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and
>
> (D) against unconstitutional exercise of authority under the ninth and tenth amendments;
>
> require additional legislation to correct existing firearms statutes and enforcement policies; and
>
> (2) additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes.[22]

This was not the first time Congress explicitly recognized the right to keep and bear arms since the Second Amendment passed Congress in 1789. To prevent the Southern states from depriving freed slaves of military muskets, pistols, and other firearms, the Freedmen's Bureau Act of 1866 required that the right

> to have full and equal benefit of all laws and proceedings concerning *personal liberty, personal secu-*

[22] Sec. 1(b), Pub. L. 99-308, 100 Stat. 449 (May 19, 1986). The Congressional finding concerning the individual right to keep and bear arms is amply supported by *The Right to Keep and Bear Arms*, Report of the Subcommittee on the Constitution, Senate Judiciary Committee, 97th Cong., 2d Sess. (1982).

rity, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color or previous condition of slavery . . . . Act of July 16, 1866, ch. 200, § 14, 14 Stat. 173, 176-77 (emphasis added.)

In 1941, Congress enacted legislation to authorize the President to requisition broad categories of property with military uses from the private sector on payment of fair compensation. Known as the Property Requisition Act, the legislation included the following provision to reaffirm and protect Second Amendment rights:

> Nothing contained in this Act shall be construed—
>
> (1) to authorize the requisitioning or require the registration of any firearms possessed by any individual for his personal protection or sport (and the possession of which is not prohibited or the registration of which is not required by existing law), [or]
>
> (2) to impair or infringe in any manner the right of any individual to keep and bear arms . . . .[23]

In *United States v. Verdugo-Urquidez*, 494 U.S. 259, 110 S.Ct. 1056, 1060-61 (1990), this Court made clear that all law-abiding Americans are protected by the Second Amendment as follows:

> "The people" seems to have been a term of art employed in select parts of the Constitution. . . . The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." See also U.S. Const., Amdt. 1, ("Congress shall make no law . . . abridging . . . *the right of the people* peaceably to assemble"); Art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second year *by the People of the*

[23] Pub. L. 274, Ch. 445, 55 Stat., pt. 1, 742 (Oct. 16, 1941).

> *several States*") (emphasis added). While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.[24]

In *United States* v. *Miller*, 307 U.S. 174 (1939), this Court addressed the Second Amendment and the National Firearms Act, holding only that

> In the absence of any evidence [in the trial court] tending to show that possession or use of a [sawed off shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. *Id.* at 179.

The test this Court thus established was not whether the person in possession of the arm was a member of a formal militia unit,[25] but whether the arm "at this time" was "ordinary military equipment" or its use "could" potentially assist in the common defense.

Since no factual record was made in the trial court that a "sawed-off" shotgun could have militia uses,[26] this

[24] "As with our First Amendment, the text of the Second is broad enough to protect rights of discrete individuals or minorities. . . ." A. Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1162 (1991), article cited as authority in *California v. Acevedo*, 111 S.Ct. 1982, 1992 (1991) (Scalia J., concurring).

[25] This Court's recent holding in *Verdugo-Urquidez*, *supra*, effectively reiterates that this test was clearly correct.

[26] According to Art. I, § 8, cl. 15 of the Constitution, the functions of the militia are: "to execute the Laws of the Union, sup-

Court did not consider whether the tax and related registration requirements of the National Firearms Act violated the Second Amendment. However, this Court has held of a newspaper tax: "It is a license tax—a flat tax imposed on the exercise of a privilege granted by the Bill of Rights. A state may not impose a charge for the enjoyment of a right granted by the federal constitution." *Murdock* v. *Pennsylvania*, 319 U.S. 105, 113 (1943). *See Thomas* v. *Collins*, 323 U.S. 516, 538-40 (1945) (state may not require registration of persons who exercise First Amendment rights); *Minneapolis Star* v. *Minnesota Comr. of Rev.*, 460 U.S. 575 (1983) (special tax on only a few newspapers invalid). "The Framers perceived singling out the press for taxation as a means of abridging the freedom of the press. . . ." *Id.* at 585 n.7.

A tax is suspect and subject to heightened scrutiny if it targets a small and discrete group of people who choose to exercise a constitutional guarantee that is the target of the tax. *Leathers* v. *Medlock*, 111 S.Ct. 1438 (1991); *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221 (1987) (both invalidating state sales taxes that taxed certain segments of the media and exempted others).

Ignoring the Second Amendment, the government argues that the NFA was enacted to fight crime and that the definition of "rifle" may be stretched to fit its view of what the law should be. But this Court recognized that:

> Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent. *Board of Governors of the Federal Reserve System* v. *Dimension Financial Corp.*, 474 U.S. 361, 374 (1986).

press Insurrections, and repel Invasions. . . ." Thus, the militia has a law enforcement function, a quasi law enforcement/quasi military function, and a military function. As a result, those firearms which are "arms" within the meaning of the Second Amendment are those which could be used to fulfill all these functions. .22 caliber pistols and rifles have been used for target practice and training purposes by the Armed Forces throughout the twentieth century.

Even if the alleged purpose of the NFA is considered, the single-shot Contender pistol and carbine kit have absolutely no usefulness for a criminal. More importantly, the NFA is the product of congressional compromises over "gun control." Every word of the NFA has been thoroughly examined and purposefully chosen by Congress. This Court should carry out those choices.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Federal Circuit should be affirmed.

Respectfully submitted,

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